UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVE SUTTA, on behalf of AUSTIN SUTTA, his minor child, Plaintiff, v. ACALANES UNION HIGH SCHOOL DISTRICT, et al., Defendants.	No. C01-1519 BZ **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

Plaintiff's second amended complaint alleges that defendants have provided Austin Sutta, a member of the Miramonte High School girls' basketball team, with athletic opportunities inferior to those offered to male students.[1] Specifically, the complaint alleges violations of (1) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., by defendant Acalanes Union High School District; (2) Austin Sutta's 14th Amendment Equal Protection rights, brought under

[1] The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

42 U.S.C. § 1983 against defendants Olson and Regalado in their individual and official capacities; (3) California Education Code § 221.7, by defendants Olson and Regalado in their individual capacities; (4) California Business and Professions Code § 17200 by defendants Olson and Regalado in their individual capacities; and (5) California Unruh Act, California Civil Code §§ 51, 51.5, and 52 by defendants Olson and Regalado in their individual capacities.

Defendants now move to dismiss plaintiff's Title IX and § 1983 claims under Federal Rule of Civil Procedure 12(b)(6).[2] (Defs.' Mem. Supp. Mot. to Dismiss at 18-24.) Defendants also argue that plaintiff's supplemental state law claims are barred by the Eleventh Amendment to the United States Constitution, (id. at 24-25), or in the alternative, that plaintiff's Unruh Civil Rights Act claim should be dismissed under Rule 12(b)(6), (id. at 25-26), and plaintiff's California Education Code § 221.7 claim should be dismissed as there is no private right of action under that statute, (id. at 26-27).[3]

In ruling on a Rule 12(b)(6) motion, the complaint must be

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[2] Given the limited purpose for which plaintiff refers to the 1979 report, the motion to strike the references is **DENIED.**

[3] Defendants also argue that Rachael Sutta's claims are moot and that plaintiff lacks standing to assert discrimination claims on behalf of coaches or other students. (Defs.' Mem. Supp. Mot. to Dismiss at 13-18.) Any claim asserted by plaintiff Rachael Sutta was mooted when she dismissed her claims on August 18, 2001. (Pl's. Notice of Voluntary Dismissal at 1.) Plaintiff does have standing to assert the claim that Austin Sutta was harmed by the decrease in the quality of the athletic program as a result of defendants' alleged discriminatory conduct. (Pl's. Sec. Am. Compl. ("SAC") at ¶ 2.)

construed in the light most favorable to plaintiff and the material factual allegations assumed true. See Wyler Summit Partnership v. Turner Broadcasting System Inc., 135 F.3d 658, 661 (9th Cir. 1998). Dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

I. Judicial Notice

Evidence outside the pleadings cannot generally be considered in deciding a Rule 12(b)(6) motion. See Farr v. United States, 990 F.2d 451, 454 (9th Cir.), cert. denied, 510 U.S. 1023 (1993). An exception to this rule is evidence which may be the subject of judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)(citing Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)). Invoking this exception, defendants request that the court take judicial notice of rosters of coaches for four high schools within the district for the 1999-2000 and 2000-2001 school years, of the district salary schedule for coaches for the 2000-2001 school year, and of the Diablo Foothill Athletic League By-laws, Constitution, and Girls and Boys Basketball Guidelines and Schedule. (Defs.' Req. Jud. Notice at 2.) Defendants' request relies on the declaration of defendant Regalado for authentication. (Id. at 3.) Defendants apparently wish to obtain judicial notice of these facts in order to dispute the existence of a valid claim by plaintiff.

Plaintiff opposes judicial notice of the requested items, and submits declarations by Austin Sutta, Steve Sutta, and Joshua Tribe, a former assistant basketball coach, to refute various statements contained in the Regalado declaration. (Pl's. Opp'n to Req. Jud. Notice at 2.)

Federal Rule of Evidence 201, which governs judicial notice, provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). For purposes of a Rule 12(b)(6) motion to dismiss, judicial notice of a triable question of fact should not be taken. See Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67, 70 (9th Cir. 1956). The parties' disagreement as to the accuracy of many of the proposed exhibits demonstrates that the information contained in that material does provide a triable question of fact and is not beyond "reasonable dispute." Moreover, whereas public documents such as Securities Exchange Commission filings and orders from other jurisdictions are capable of ready determination by sources of unquestionable accuracy, see Yuen v. U.S. Stock Transfer Co., 966 F. Supp. 944, 945 n.1 (C.D. Cal. 1997), a weaker argument for accuracy exists where one of the parties to the instant action is the only source of authentication presented. (Defs.' Req. Jud. Notice at 3.) I therefore decline to take judicial notice of the items

requested by defendants.

II. Federal Claims

Plaintiff's second amended complaint alleges that defendants have failed to provide equal athletic opportunities to Austin Sutta, a female participant, by their actions in providing unequal access to coaching and academic support, (SAC at ¶¶ 17-20), unequal publicity, (id. at ¶¶ 21-22), unequal transport to games and travel funding, (id. at ¶¶ 25-26), unequal booster funding, (id. at ¶ 27), unequal practice and competitive facilities, (id. at ¶ 29), and by scheduling girls' games at inconvenient times, (id. at ¶¶ 23-24), and practicing a policy of retaliation for complaints. (Id. at ¶ 28.) Plaintiff alleges that it is the policy of the defendant school district to engage in the aforementioned discriminatory practices, and that the individual defendants have, in addition to carrying out that policy in their official capacities, made specific decisions resulting in Austin Sutta's unequal access to athletic opportunities. (Id. at ¶¶ 36-53.)

A. Title IX Claim

Title IX of the Education Amendments of 1972 states in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a)(2000). The regulations implementing Title IX further prohibit a recipient

of federal funds which operates or sponsors an interscholastic athletic program from denying equal opportunities for both sexes. See 34 C.F.R. § 106.41 (2000). Defendants do not dispute that they receive federal funding and are thereby covered by Title IX. The only question that remains is whether, under the federal liberal pleading requirements, plaintiff has alleged some set of facts that could be proven to violate Title IX and its implementing regulations. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996). Rather than dispute the existence of a set of facts sufficient for plaintiff to assert his claim, defendants instead dispute the truth of the facts plaintiff alleges. Resolution of such a dispute should come, as plaintiff contends, only after the necessary discovery has been conducted. At this stage of the proceedings, I find that plaintiff's allegations state a claim for gender based denial of equal opportunities by a federal recipient, and that plaintiff may proceed with his Title IX claim.

B. 28 U.S.C. § 1983 Claim

In order to state a claim under § 1983, a plaintiff must allege (1) "that a person acting under color of state law committed the conduct at issue"; and (2) "that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States." Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988). Plaintiff alleges that Austin Sutta has been denied equal protection rights based on the individual defendants' actions.

Plaintiff alleges that both individual defendants have made specific decisions to grant girls teams unequal access to the items discussed above, while acting under color of state law, and that Austin has been harmed by those decisions. Defendants argue that "[s]weeping conclusory allegations will not suffice to *establish Section 1983 liability* [and] [p]laintiffs must instead set forth specific facts as to each individual defendant's deprivation of protected rights." (Defs.' Mem. Supp. Mot. to Dismiss at 23-24 (citing Leer, 844 F.2d at 634).)(emphasis added). Defendants fail to mention, however, that Leer involved a § 1983 claim in the context of a motion for summary judgment. See Leer, 844 F.2d at 634 ("Sweeping conclusory allegations will not suffice to *prevent summary judgment*.")(emphasis added). In light of the less stringent standard associated with a Rule 12(b)(6) motion to dismiss, I find that plaintiff has pled sufficient facts to state a § 1983 claim.

III. State Law Claims

A. Eleventh Amendment

Defendants also argue that plaintiff's state law claims should be dismissed as barred by the Eleventh Amendment, relying on Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). In that case, the Supreme Court held that the Eleventh Amendment prohibits federal courts from granting both prospective and retroactive relief against state officials based on violations of state law, noting that "it is difficult to think of a greater intrusion on state sovereignty than when

a federal court instructs state officials on how to conform their conduct to state law." Id. at 106. This principle has equal application "to state law claims brought into federal court under pendent jurisdiction." Id. at 121. However, the Court left open the question of whether state officials could be sued in their individual capacities, distinguishing earlier cases in which plaintiffs had sought monetary damages from cases in which plaintiffs sought an injunction. See id. at 111, n.21. (citing Belknap v. Schild, 161 U.S. 10, 23-25 (1896)(disallowing injunctive relief against state officers when the relief would run more directly against the state); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-688 (1949)(distinguishing suits seeking money damages against the individual officer in tort from those seeking injunctive relief against the state officer in his official capacity)).

The Ninth Circuit has since held that officers sued in their individual capacity for violations of state law can be liable for monetary damages. See Han v. U.S. Dep't of Justice, 45 F.3d 333 (9th Cir. 1995)("The Eleventh Amendment does not bar a suit seeking damages against a state official in his individual capacity."); see also Pena v. Gardner, 976 F.2d 469, 474 (9th Cir. 1992)("[T]he eleventh amendment will not bar pendent state claims by [plaintiff] against state officials acting in their individual capacities."). More significantly, our district has recently upheld against an Eleventh Amendment challenge two pendent state law claims

seeking injunctive relief against state officials "to the extent the named state officials are being sued in their individual capacities." Emma C. v. Eastin, 985 F. Supp. 940, 948 (N.D. Cal. 1997).

Plaintiff's complaint is unclear as to whether it seeks injunctive relief against defendants Olson and Regalado in their official or individual capacities. On the one hand, plaintiff repeatedly states that Olson and Regalado's violations of state law rest in part on "the adoption and implementation of the policies and practices of Miramonte High School." (SAC at ¶¶ 43, 48, 52.) On the other hand, the body of the complaint fails to unambiguously specify the capacity in which the suit is brought, whereas the captions for the state causes of action name the defendants in their individual capacities. (Id. at 12, 13, 15.) Furthermore, plaintiff immediately follows his allegations against the individual defendants regarding the implementation of school policies with specific acts of misconduct, including the intentional refusal by both defendants to take action regarding the continued complaints leveled against Coach Spinola's abusive conduct. (Id. at 12, 13, 15; Pl's. Mem. in Opp'n to Mot. to Dismiss at 11.)

In determining whether plaintiff is seeking injunctive relief against defendants in their official or individual capacities, the court must focus on against whom the requested relief is to run. Although the case law addressing this question has only involved claims for compensatory relief, the

Ninth Circuit has intimated that a suit requesting the court to bind the state in any way in the future would directly impact the state, thereby resulting in a successful Eleventh Amendment challenge. See, e.g., Ashker v. California Dep't of Corrections, 112 F.3d 392, 394 (9th Cir.), cert. denied, 522 U.S. 863 (1997)(citing Pennhurst, 465 U.S. at 117). Plaintiff's complaint is again ambiguous as to this point. Plaintiff requests the "[e]ntry of a . . . permanent injunction enjoining defendants from continuing discriminatory practices . . . ." (SAC at 16.) However, plaintiff neither specifies the nature of the injunctive relief nor whether the injunction is to run against the State or the individual defendants. Without more, I cannot determine whether plaintiff seeks injunctive relief on his state law claims which in effect will run against the district. If such relief forced the district to expend monies to provide improved access to athletic opportunities to girls teams, it could violate the Eleventh Amendment. Viewing the complaint in the light most favorable to plaintiff, plaintiff has pled sufficient facts to maintain his state causes of action against the defendants in their individual capacities. I will permit plaintiff's state law causes of action to survive defendants' Eleventh Amendment challenge pending further discovery regarding the nature and type of injunctive relief that plaintiff is seeking.

B. Unruh Civil Rights Act Claim

Section 51 of the California Civil Code provides that

"[a]ll persons within the jurisdiction of this state are free and equal and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51 (West 1982). Section 51.5 states that "[n]o business establishment of any kind whatsoever shall discriminate against . . . any person in this state because of the . . . sex . . . of the person." Id. at § 51.5. School districts are business establishments for purposes of the Unruh Civil Rights Act. See Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1988 (N.D. Cal. 1997); Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947, 952 (E.D. Cal. 1990). Additionally, the Unruh Act "prohibits only intentional discrimination and not practices that have a disparate impact on one class of persons." Nicole M., 964 F. Supp. at 1388-89 (citing Harris v. Capitol Growth Investors, 52 Cal. 3d 1142, 1149, 1172 (1991)).

In Nicole M., the court held that the failure of a school district, its superintendent and a principal to adequately respond to complaints of sexual harassment constituted intentional discrimination for purposes of a violation of Cal. Civil Code § 51. See id. at 1389; see also Davison v. Santa Barbara High Sch. Dist., 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998)(holding that a school official's refusal to respond to student's complaints of peer racial discrimination satisfied "intentional discrimination" sufficient to withstand a motion

to dismiss). At the very least, the court continued, plaintiffs could still maintain a cause of action under the broader language of Cal. Civil Code § 51.5. See Nicole M., 964 F. Supp. at 1389. Having alleged discriminatory treatment with regard to the repeated failure of defendants to respond to complaints of abusive conduct by Austin Sutta's coaches, (SAC at ¶ 18-20, 21, 22-23, 28), in addition to defendants' discriminatory hiring and compensation decisions with regard to coaching, (SAC at ¶ 17-20), and their discriminatory funding decisions and provision of unequal practice facilities with regard to girls teams, (SAC at ¶¶ 17-20, 28-29), plaintiff has met his burden of alleging facts demonstrating intentional discrimination actionable under the Unruh Civil Rights Act.[4]

C. California Education Code § 221.7 Claim

Finally, defendants move to dismiss plaintiff's California Education Code § 221.7 claim, asserting that there is no private right of action under the statute. "It seems relatively well-established under California law that 'to imply a private right of action, the court must determine that a private right of action is needed to ensure the effectiveness of the statute.'" Id. at 1390 (quoting Arriaga v. Loma Linda Univ., 10 Cal. App. 4th 1556, 1564 (1992)). In

[4] Moreover, an allegation of intentional discrimination resulting from the failure to respond to repeated complaints of discriminatory conduct would appear to be even stronger when the complaints focus on coaches' conduct rather than peer conduct. Surely, a principal and a superintendent can respond more efficiently and thoroughly to reports of coaching misconduct on their own staff.

the instant case, plaintiff has a private right of action under Title IX, Section 1983, the California Business and Professions Code and the California Unruh Act. It is therefore not necessary to infer a private right of action under § 221.7. See id. (refusing to infer a private right of action under the California Education Code when plaintiffs can proceed under Title IX, Section 1983 and the California Unruh Act). Additionally, whether a private right of action exists under § 221.7 appears to be a novel question of state law, and I would decline to exercise supplemental jurisdiction over this claim pursuant to 28 U.S.C. § 1367, particularly in light of the fact that plaintiff's remaining claims arising out of the same conduct will proceed.

IV. Conclusion

Therefore, **IT IS HEREBY ORDERED** that defendants' motion to dismiss plaintiff's complaint is **DENIED** as to plaintiff's Title IX, 42 U.S.C. § 1983, Cal. Bus. and Professions Code § 17200 and Cal. Unruh Act claims, and is **GRANTED** as to plaintiff's Cal. Educ. Code § 221.7 claim. Defendants' motion for a more definite statement is **DENIED**. Defendants have until **October 18, 2001**, to file an answer to plaintiff's second amended complaint.

Dated: October 3, 2001

/S/ Bernard Zimmerman
Bernard Zimmerman
United States Magistrate Judge